IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAMES POTTER, Plaintiff/Appellant, v. DALE WHEELAND, D.O. and JANE DOE WHEELAND, husband and wife; and DR. CHIU-AN CHANG and JANE DOE CHANG, husband and wife, Defendants/Appellees.	2 CA-CV 2006-0191 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20063192

Honorable Deborah Bernini, Judge

REVERSED AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant/plaintiff James Potter appeals from entry of summary judgment against him and in favor of appellees/defendants Dale Wheeland, D.O., and Dr. Chiu-An Chang. The trial court concluded Potter's medical malpractice claims were "barred by the applicable two-year statute of limitations" because he was not "reasonably justified" in failing to investigate over a four-year period whether his injury might have resulted from defendants' negligence. On appeal, Potter contends he presented sufficient evidence to create a question of material fact as to whether he had exercised reasonable diligence in discovering the two doctors' malpractice. He therefore asserts the trial court erred in granting the defendants' motions for summary judgment. We agree and reverse the judgment and remand for further proceedings consistent with this decision.

¶2 In reviewing a trial court's grant of summary judgment, we view the facts and all inferences therefrom in the light most favorable to Potter, the party against whom summary judgment was granted. *Vern Walton Motors v. Taylor*, 121 Ariz. 463, 464, 591 P.2d 555, 556 (App. 1978). In June 2000, Potter moved to Tucson from New Jersey. The day before reaching Tucson, he noticed a "large, swollen mass and lesion" on the back side of his right knee. Soon thereafter, he consulted Wheeland about it. He told Wheeland that "he had been living in deer country in New Jersey" and inquired whether he might have Lyme disease. Wheeland assured Potter that he did not have Lyme disease and that the swelling was most likely from a spider bite for which Wheeland prescribed medication.

¶3 Potter's symptoms did not improve with the medication and, in the beginning of July, he returned to Wheeland because he was suffering from swelling in his face, neck, shoulder, and chest; paralysis in the left side of his face; and impaired speech. On July 11, 2000, Wheeland diagnosed Potter with Bell's palsy. Three days later, Potter consulted Chang for a second opinion. Potter again explained that he had been living in New Jersey and first noticed a "tiny red bump" on his drive to Tucson from New Jersey. Chang agreed with Wheeland's diagnosis and treated Potter with acupuncture for Bell's palsy.

¶4 After his symptoms persisted for the next several years, Potter consulted Michael Bischof, D.O., on June 11, 2004, about his swollen knee, which Potter attributed to the bug bite he purportedly had received four years earlier. Dr. Bischof conducted a blood test, the results of which established Potter had Lyme disease. On July 16, 2004, Eskild Petersen, M.D., officially diagnosed Potter with Lyme disease. Potter filed this malpractice action against Wheeland and Chang on June 13, 2006.

¶5 We review *de novo* whether the trial court properly granted summary judgment. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We will affirm summary judgment only when "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d

1000, 1008 (1990); *see also Lasley v. Helms*, 179 Ariz. 589, 591, 880 P.2d 1135, 1137 (App. 1994).

¶6 The defendants argued below, as they do on appeal, that they were entitled to summary judgment in their favor because the applicable statute of limitations barred Potter's claims. Specifically, they contend Potter's claims accrued in October 2000, "when he began to suffer further pain and symptoms." The trial court agreed and concluded Potter was aware of his symptoms, suspected he had Lyme disease, waited more than four years to investigate whether his injury resulted from the defendants' negligence, and did not file a complaint for six years, and thus, his claims were time barred.

¶7 Potter's claims are governed by A.R.S. § 12-542(1), which provides that a medical malpractice action "shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward." The statute of limitations protects defendants "from stale claims where plaintiffs have slept on their rights." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995). A "blamelessly uninformed plaintiff," however, "cannot be said to have slept on his rights." *Id.* at 591, 898 P.2d at 969. For this reason, under the discovery rule a claim accrues when "a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 423, 747 P.2d 581, 584 (App. 1987). "A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual . . . [b]ut [he/she] must at least

possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Doe v. Roe*, 191 Ariz. 313, ¶ 32, 955 P.2d 951, 961 (1998) (citations omitted). Thus, the question is not whether Potter had an opportunity to discover the doctors' negligence, but "whether a reasonable person would have been on notice to investigate." *Walk v. Ring*, 202 Ariz. 310, ¶ 24, 44 P.3d 990, 996 (2002).

¶8 We conclude Potter presented sufficient evidence to raise a question of material fact regarding whether a reasonable person would have waited until 2004 to further investigate whether the doctors had misdiagnosed him. In granting summary judgment, the trial court emphasized that Potter was both aware of his symptoms and suspected he had Lyme disease in the summer of 2000, when Wheeland and Chang diagnosed him with Bell's palsy. From this, the court concluded that Potter would have been on notice from that time to investigate Wheeland's and Chang's potential negligence.

¶9 The trial court overlooked that Potter sought Wheeland's diagnosis and opinion, as well as Chang's second opinion, precisely because they possessed expertise superior to his own and that Potter therefore might reasonably rely on those opinions. According to Potter, both defendants advised him he did not have Lyme disease but that he had another specific disease. Under such circumstances, a reasonable person might not question or investigate the accuracy of Wheeland's and Chang's consistent diagnoses until he received a contrary diagnosis from another medical expert. Thus, viewing the facts in the light most favorable to Potter, a jury could conclude that Potter was "blamelessly

uninformed" that he had been misdiagnosed and that he had exercised reasonable diligence in not seeking a *third* opinion until four years after Wheeland and Chang diagnosed him.

¶10 Wheeland and Chang rely on *Doe* to support their argument that summary judgment was appropriate. In *Doe*, our supreme court addressed the accrual date of the statute of limitations in the context of the adult plaintiff's recovered memories of childhood abuse. 191 Ariz. 313, ¶ 2, 955 P.2d at 953-54. There, the court suggested that the claim would accrue from the plaintiff's first flashback of childhood abuse unless plaintiff could produce additional evidence explaining why that flashback did not necessarily constitute discovery of her injury. *Id.* ¶ 32. Seizing on this reasoning, Wheeland and Chang contend that Potter failed to produce additional "evidence to account for his four year delay in investigating" his symptoms following the treatment they provided.

¶11 But, Potter's initial suspicion that he had Lyme disease, in light of Wheeland's and Chang's express rejection of that diagnosis, would not necessarily trigger Potter's awareness that the doctors were wrong and that he had been injured as a result. Thus, the scenario addressed by the court in *Doe* has little applicability here. To argue otherwise, Wheeland and Potter implicitly suggest that no reasonable person would rely on their diagnoses in addressing medical ailments without immediately seeking a third opinion.

¶12 As our supreme court repeatedly has stated, the question of when a plaintiff discovered or should have discovered his or her injuries is generally a question of fact for the jury. *See id., citing Gust*, 182 Ariz. at 591, 898 P.2d at 969 ("When discovery occurs and

a cause of action accrues are usually and necessarily questions of fact for the jury."). This case, wherein the parties present a genuine factual dispute about whether Potter exercised due diligence in discovering the defendants' alleged malpractice, provides no exception to that general rule.

¶13 For the foregoing reasons, we conclude the trial court erred in granting summary judgment in favor of the defendants. We therefore reverse and remand for proceedings consistent with this decision.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge